IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KIMBERLY-CLARK WORLDWIDE, INC., a Delaware corporation, Respondent/ Cross-Appellant, v. UNITED WOOD PRODUCTS COMPANY, an Oregon corporation, Appellant/ Cross-Respondent.	)	No. 61953-5-I DIVISION ONE UNPUBLISHED FILED: June 29, 2009

Cox, J. — United Wood Products Company (United) appeals the trial court's order granting partial summary judgment to Kimberly-Clark Worldwide (K-C), dismissing United's counterclaim for breach of contract and various counterclaims for breach of the implied duty of good faith and fair dealing.[1] The trial court properly entered partial summary judgment in favor of K-C against United, reserving for trial only those matters on which there were genuine issues of material fact. We affirm.

[1] We hereby grant Respondent's Motion for Limited Admission, pursuant to APR 8(b), dated May 26, 2009, permitting David M. Stahl to represent Kimberly-Clark Worldwide, Inc. in this appeal. We deny the Motion to Strike dated May 6, 2009 of United Wood Products Co.

In August 2003, K-C entered into two agreements with United: a Wood Fuel Supply and Services Agreement (SSA) and a Purchase and Sale Agreement for real property (PSA). Under the SSA, K-C agreed to purchase its wood fuel requirements for a boiler on its property exclusively from United. In exchange, United agreed to acquire, process, and transport the necessary wood fuel.

K-C's union threatened to file a grievance under its collective bargaining agreement with K-C if work that K-C employees had traditionally performed was done by others. In order to deal with this contingency, both K-C and United agreed that if work under the SSA was conducted on property either leased to United or not owned by K-C, then the union would not likely be successful in any grievance it might file with the National Labor Relations Board (NLRB). Thus, K-C also agreed to sell to United approximately 10 acres of real property at a facility known as Riverside where United would process the wood waste fuel. This PSA was entered into at about the same time as the SSA and contained cross-default provisions with the SSA. To bridge the time gap between the execution of the SSA and closing under the PSA, the parties entered into a lease for Riverside.

The PSA did not close as of its stated expiration date in 2003. Moreover, it did not close despite an extension to the end of 2004.

In February 2004, the parties altered the wood fuel requirement and payment amounts required under the SSA in a memorandum of understanding.

This was done because United was experiencing "unanticipated extra costs, expenses, and delays."[2] The Memorandum of Understanding extended the PSA's expiration date from December 30, 2003 to November 30, 2004.

Following the execution of the SSA and PSA, K-C's union filed a grievance. In July 2004, an NLRB arbitrator concluded that it was improper for United to use its employees on the Riverside property before the closing of the PSA transaction. The arbitrator held that at least four K-C union employees should have been used for the work on the property. The arbitrator ordered K-C to pay back wages to the four union employees who should have been doing the work.

K-C terminated the SSA on October 1, 2004, citing the arbitrator's ruling and United's deficient performance as two separate bases for termination. The PSA expired of its own terms on November 30, 2004 without United purchasing the Riverside property.

United sued K-C in federal district court. The court dismissed that suit based on improper venue. K-C then commenced this action for breach of the SSA and fraud in Snohomish County Superior Court. United filed counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing, among other things. K-C moved for summary judgment on United's counterclaims, which the trial court granted in part. The remaining claims were heard by a jury, which awarded K-C $1 in nominal damages. The jury also found

[2] Clerk's Papers at 947.

in favor of K-C on United's counterclaims.

United appeals and K-C cross-appeals.

TERMINATION OF SSA

United argues that the trial court erred in deciding on summary judgment that K-C justifiably relied on the NLRB arbitrator's decision and paragraph 7.03(g) of the SSA to terminate the SSA. We disagree.

A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law.[3] We review a summary judgment order de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.[4]

Washington follows the objective manifestation theory of contracts.[5] Under this approach, the court attempts to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed, subjective intent of the parties.[6] The context rule recognizes that the intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument's execution.[7] Contextual evidence is to be

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[3] CR 56(c).

[4] Khung Thi Lam v. Global Med. Sys., 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005).

[5] Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

[6] Id.

[7] Id. at 502 (discussing Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990)).

used to determine the meaning of ***specific words and terms used*** and not to show an intention independent of the instrument or to vary, contradict, or modify the written word.[8]

A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.[9] Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.[1]

Here, neither party disputes that the SSA was an integrated agreement. The SSA contained several termination provisions. The one at issue here is 7.03(g), which states:

> 7.03 Termination. This Agreement may be terminated:
>
> (g) upon the final ruling of the National Labor Relations Board or a duly appointed arbitrator finding that the work contemplated under this Agreement should have been performed by unionized employees that work for K-C.[11]

In a decision and order dated July 22, 2004, an NLRB arbitrator considered

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[8] Id. at 503 (quoting Hollis v. Garwall, Inc., 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)) (additional emphasis added).

[9] Berg, 115 Wn.2d at 668 (quoting Restatement (Second) of Contracts § 212 (1981)).

[1] Id.; see also Tanner Elec. Co-op v. Puget Sound Power & Light, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) ("Interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from extrinsic evidence." (citing Scott Galvanizing, Inc. v. NW EnviroServices, Inc., 120 Wn.2d 573, 582, 844 P.2d 428 (1993))).

[11] Clerk's Papers at 1479.

whether K-C violated its collective bargaining agreement with the union by allowing United workers to perform work relating to storing and maintaining wood waste fuel on the Riverside property that United had agreed to buy. The arbitrator ruled:

> As of the date of this Decision, the proprietorship arrangements between United Wood Products and Kimberly-Clark have not been finally concluded. If prior to that time, United were using its own Employees such was improper. During that period, at least four Employees of Kimberly-Clark should have been used. Accordingly, for the period involved when United Employees were being used instead of Kimberly-Clark Employees, the wages paid for four United Employees shall be paid to Kimberly-Clark and such sums shall be distributed equitably among appropriate Kimberly-Clark Employees. When a point has been reached that there is a final agreement concluded between United and Kimberly-Clark as to their relationship, at that point, United Wood Products may use all of its own Employees.[12]

The trial court decided that this ruling triggered K-C's right to terminate the SSA under section 7.03(g) because the union work at issue related to that work that should have been performed by four employees of K-C. The correctness of this decision depends on what "work" means under section 7.03(g) of the SSA.

The SSA does not define either "work," or "the work contemplated under this Agreement." The most reasonable interpretation of these provisions is that the "work" to which section 7.03(g) refers is the work of the four K-C employees who had been maintaining the wood waste pile prior to United's entry on the scene. That was the focus of the decision of the NLRB arbitrator and that is the most reasonable interpretation of what the parties mutually intended when they

[12] Clerk's Papers at 1396.

entered into the SSA and PSA in August 2003. There was no evidence in the record at the time of the summary judgment hearing that any other work contemplated by the SSA was ever the subject of union work or union complaints at K-C. Thus, the parties had no reason to provide in the SSA for termination if the union successfully challenged non-union work. Such a provision would have been senseless. The trial court properly determined that the arbitrator's ruling triggered section 7.03(g), as a matter of law.

United argues that section 7.03(g) is triggered only if an arbitrator rules that ***all*** work contemplated by the SSA should have been done by unionized K-C employees. As we have explained, this argument is unpersuasive.

For example, United acknowledges in its opposition to K-C's summary judgment motion that "[a]s the parties were contemplating the SSA (and PSA), K-C's union made it clear that it would seek to shut down United's operation, taking the position that United could not use its own employees ***to perform the work of the four unionized employees who groomed the wood pile***."[13] United's CEO James Winters further described the circumstances of the agreement in a declaration:

> Sometime during 2001, K-C inquired about United's ability to exclusively supply the No. 14 Boiler with its primary source of fuel, wood waste chips. . . . The entities that currently supplied KC (30 separate companies) with the wood waste were primarily land clearing and/or Landscaping companies, Recycling Yards and to a lesser extent, lumber mills (***in addition, four K-C Union employees maintained the inventory of wood waste on K-C's property***).[14]

[13] (Emphasis added.)

Thus, the evidence that United itself submitted both supports the trial court's ruling and runs counter to United's legal argument.

United also argues that summary judgment was improper because there are questions of fact whether the NLRB decision triggered section 7.03(g). But United fails to identify any genuine issues of material fact and also fails to identify the "different accounts of the parties' objective manifestations" that it claims exist. The fact that the parties disagreed as to the interpretation of the scope of section 7.03(g) does not by itself create a jury question.

As for the remaining extrinsic evidence that United cites as proof of the existence of genuine issues of material fact or in support of its argument that the trial court's interpretation of section 7.03(g) was incorrect as a matter of law, it is unconvincing. This evidence consists primarily of assertions by CEO Winters as to what the parties "understood" or "contemplated," including his statements that "both parties agreed that if the Arbitrator *terminated* the contract then section 7.03(g) would apply," and that the parties agreed "to make a termination extremely tough." Case law is clear that extrinsic evidence is not to be used to show an intention independent of the instrument or to vary, contradict, or modify the written word.[15] This evidence runs contrary to that well-settled principle of law. Moreover, our purpose is to determine the parties' intent by focusing on the objective manifestations of the agreement, not the unexpressed subjective intent

[14] Clerk's Papers at 716 (emphasis added).

[15] Hearst, 154 Wn.2d at 503.

of the parties.[16] For this additional reason, we are not convinced by the evidence to which United points.

The trial court properly granted summary judgment on the question of whether K-C justifiably terminated the SSA on October 1, 2004, based on section 7.03(g) of the SSA.

GOOD FAITH AND FAIR DEALING CLAIMS

United also argues that the trial court erred in dismissing on summary judgment certain of its claims against K-C for breach of the implied duty of good faith and fair dealing. We disagree.

The duty of good faith and fair dealing is implied in every contract.[17] This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.[18] But the duty of good faith does not "inject substantive terms into the parties' contract."[19] Rather, "it requires only that the parties perform in good faith the obligations imposed by their agreement."[2] The supreme court has "consistently held there is no 'free-floating' duty of good faith and fair dealing that is unattached to an existing contract."[21] The duty exists

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[16] Id.

[17] Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

[18] Id.

[19] Id.

[2] Id.

[21] Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177, 94 P.3d 945 (2004).

only in relation to performance of a specific contract term.[22]

Here, the partial summary judgment order granted in its entirety K-C's request to dismiss United's bad faith claim based on allegations of K-C negotiating with the City of Everett for a related property sale while the proposed sale of Riverside was pending. Similarly, the trial court granted in its entirety K-C's request to dismiss United's bad faith claim based on allegations that K-C did not actively participate in a Level II environmental assessment of the Riverside property. The trial court denied the request for summary judgment on whether K-C breached the implied covenant of good faith as a result of terminating the SSA on October 1, 2004, instead of waiting until November 30, 2004, to see if United could successfully close the PSA. The trial court also dismissed a variety of additional bad faith claims that are not at issue in this appeal. Liability and damages for those matters not dismissed on summary judgment were reserved for trial.

Phase II Environmental Report

United argues that the trial court's summary dismissal of its claim of bad faith regarding a Phase II environmental report was improper because questions of fact remained for the jury. It argues that K-C's different version of events demonstrates that there were material fact questions. We disagree.

The PSA contains several provisions that are relevant to this claim. The agreement expressly states "Purchaser's obligation to close shall not be

[22] Id.

contingent upon Purchaser's ability to obtain financing."[23] The agreement also states "There are no contingencies which apply to this Agreement."[24] The agreement expressly references a "Phase I Environmental Report," but makes no mention of any other environmental report. Finally, the PSA states that United agreed to purchase the property "as is, where is, with all faults."

These written provisions make clear that the parties never agreed that a Phase II environmental testing report related to the Riverside property was part of the transaction for the sale of that property. Moreover, the PSA clearly states that there are no contingencies (environmental or otherwise) to the agreement. More specifically, the PSA affirmatively states that financing was not a contingency to the sale of the property, which was to be purchased "as is, where is, with all faults." The evidence submitted in opposition to the motion for summary judgment on the question of Phase II testing does not raise any genuine issues of material fact.

United argues, without citation to authority or contractual provisions, that K-C's actions with respect to the environmental testing show bad faith and delayed United's purchase of the property. Clearly, K-C had no duty to perform Phase II testing. Moreover, it had no duty to assist United with securing financing. Parties are only required to perform in good faith ***the obligations imposed by their agreement***.[25] There is nothing in the PSA that imposes any

[23] Clerk's Papers at 388.

[24] Clerk's Papers at 389.

of the obligations that United argues. The fact that the parties disagree about the underlying events here is of no consequence because they show nothing about K-C's performance or nonperformance of a specific contract term.[26]

United next argues that K-C somehow assumed a duty to conduct its own Phase II testing. But United cites no authority in support of this argument, and the duty of good faith alone does not inject substantive terms into the parties' contract.[27]

The trial court correctly dismissed in its entirety this claim on summary judgment.

Negotiations with the City of Everett

United argues that K-C breached its duty of good faith by negotiating a sale of Riverside to the City of Everett while United's PSA was still pending. We disagree.

Several months before United and K-C entered into the SSA and PSA, K-C inquired of the City of Everett if the City had any interest in purchasing 96 acres from K-C. While United's PSA was pending, K-C informed the City that the PSA might not close and that it wanted to terminate the PSA. The record does not show, and United does not allege, that K-C entered into a purchase and sale agreement with the City regarding the Riverside property before the

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[25] Badgett, 116 Wn.2d at 569 (emphasis added).

[26] See Keystone, 152 Wn.2d at 177 (duty of good faith exists only in relation to performance of a specific contract term).

[27] Badgett, 116 Wn.2d at 569.

PSA's extended expiration date of November 30, 2004.

As in the case of the environmental report, United does not identify a contractual obligation with respect to which K-C allegedly acted in bad faith. Nor has United presented facts showing that any of K-C's discussions with the City had an impact on United's ability to perform its contractual obligations. While it is clear that K-C terminated the SSA on October 1, 2004, there is no indication in the record, nor does United allege, that K-C terminated the PSA before its expiration on the extended date for performance by United, November 30, 2004.

The trial court correctly concluded that there were no genuine issues of material fact and that K-C was entitled to judgment as a matter of law on this issue.

Payment Delays

United also argues that the trial court erred in granting K-C summary judgment on the bad faith issue regarding K-C's "intentionally withholding" payments from United. We disagree.

United admits that it was allowed to introduce evidence of K-C's late payments at trial, but goes on to argue that the summary judgment ruling prevented it "from discussing the late payments in any meaningful way – e.g., that the late payments were part of a pattern of conduct establishing K-C's breach of the duty of good faith." This argument is unpersuasive.

Again, United cites no authority under which the trial court is alleged to have erred. Moreover, it is difficult to see prejudice given that evidence of late

payments was admitted at trial and the court instructed the jury on good faith.

Cumulative Error

United argues that even if the errors alleged above are insufficient to warrant a new trial standing alone, the cumulative effect of the errors requires remand.[28] We disagree.

Cumulative error is a concept that has exclusively been used in criminal cases.[29] This is not such a case, and we decline to apply the principle to this case in which there is no showing of error at all.

United also argues that the partial summary judgment order "fragmented United's claims for breach of contract, resolving some claims for breach and leaving others for trial."[3] United claims the order conflicts with CR 56(d), which states as follows:

> Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

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[28] Brief of Appellant at 42 (citing State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998)).

[29] See, e.g., Johnson, 90 Wn. App. at 74.

[3] Brief of Appellant at 23.

We have reviewed CR 56 and the partial summary judgment order in this case and conclude that the order is not inconsistent with the court rule. There is nothing in the rule that prevented the trial court from structuring its detailed partial summary judgment order in the manner it chose: the court granted summary judgment on certain claims and reserved others for trial. More importantly, there is no convincing showing of prejudice on this record. Accordingly, we also reject this claim.

In sum, the trial court properly granted partial summary judgment to K-C against United, reserving for trial those matters on which there were genuine issues of material fact.

Although K-C cross-appeals, we conclude it is unnecessary to reach the issues related to that cross-appeal. Our resolution of the issues that we have discussed is dispositive of this matter.

We affirm the partial summary judgment order in favor of K-C.

Cox, J.

WE CONCUR:

Schindler, C.J.